2d Civil No. B207468

COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BARRY A. BOWMAN,

Plaintiff and Respondent,

vs.

TOMMIE WYATT, JR., CITY OF LOS ANGELES, et al.,

Defendants and Appellants.

Appeal from the Superior Court of Los Angeles County
Superior Court Case No. BC329390 (Consolidated with PC038773)
Honorable Holly E. Kendig, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

In this action for injuries sustained in a motorcycle-truck collision, the jury returned a verdict in favor of plaintiff Barry Bowman, against defendants Tommie Wyatt and the City of Los Angeles. The jury found Wyatt negligently operated his truck in executing a left hand turn in front of Bowman's motorcycle. The jury further found that Wyatt was an employee of the City at the time of the accident, that the City breached a duty to maintain the truck in good working condition, including the brakes, and that the truck was a "dangerous condition of public property." The jury returned a verdict of over $15 million.

Appellant the City does not dispute there is evidence in the record to support a finding that Wyatt was an employee of the City. However, since the jury was improperly and unfairly instructed on the law on this issue, the City is entitled to a new trial.

The trial court also erred in holding that the City was the motor carrier for the truck as a matter of law and taking that issue away from the jury. And there is no substantial evidence to support holding the City liable for failing to inspect the truck or the brakes or for a dangerous condition of public property because there was no substantial evidence that the condition of the truck was in any way a proximate cause of the accident. The court further erred in allowing the issue of peculiar risk to go to the jury since it is not applicable to these facts as a matter of law.

For these reasons, the judgment in favor of plaintiff must be reversed, and a new trial granted the City on issues addressing its liability.

STATEMENT OF FACTS

Plaintiff Barry Bowman was seriously injured in October 2004 when the motorcycle he was riding southbound on Wilbur Avenue collided with a truck driven by defendant Tommie Wyatt, Jr., which was making a left hand turn onto the northbound side of Wilbur in front of plaintiff. (20 RT 1260-1265; 28 RT 3625-3627.) Wyatt had been hauling asphalt for the City of Los Angeles and had just delivered a load before the accident occurred. (28 RT 3623-3625.) Wyatt testified that he stopped the truck at least three times before the accident. (28 RT 3626-3627.) Eyewitnesses to the accident denied he stopped, but admitted he was traveling very slowly – as little as one mile per hour and certainly less than 10-14 miles per hour. (20 RT 1263; 21 RT 1549; 29 RT 3919.) Witnesses also testified that Wyatt's truck went through the stop sign, and that Wyatt did not see Bowman or the motorcycle and did not stop until he collided with the motorcycle. (20 RT 1260-1265; 21 RT 1506-1514; 29 RT 3909-3917.)

Plaintiff sued Wyatt and the City for personal injury and the action went to trial in November 2007. (II AA 317.) Plaintiff's theories of liability against the City were: (1) the City was liable for Wyatt's negligence in operating the truck because Wyatt was an employee of the City; (2) as the motor carrier for Wyatt's truck, the City was ultimately responsible for any failure to maintain the truck, including the brakes; (3) the truck constituted a "dangerous condition of public property" for which the City was liable; and (4) to the extent Wyatt was an independent

contractor rather than an employee, the operation of his truck constituted a "peculiar risk" for which the City was responsible. (I AA 1-10.)

The evidence was controverted on virtually every issue, but the primary areas of dispute were whether Wyatt was a City employee or an independent contractor, and whether the City or Wyatt was the "motor carrier" legally responsible for upkeep of the truck. More specific facts are set forth below, in the relevant legal discussions. Ultimately, the trial court ruled that the City was the motor carrier as a matter of law (32 RT 4807, 4817-4820, 4826-4829), which also led to the conclusion that the City was liable to Bowman for failing to inspect the brakes and for a dangerous condition of public property. The jury found Wyatt was an employee of the City at the time of the accident, thereby making the City liable for Wyatt's negligence. (33 RT 5103-5104, 5113.) Finally, the jury found that Wyatt's operation of the truck created a peculiar risk for which the City was liable. (33 RT 5108; I AA 67-69.)

STATEMENT OF THE CASE AND APPEALABILITY

The jury returned a verdict in favor of Bowman and against Wyatt and the City on December 20, 2007. (I AA 67-69.) The trial court denied the City's motions for new trial and motion for judgment notwithstanding the verdict on March 20, 2008, and the notice of ruling was served March 25, 2008. (II AA 267-272.) This timely appeal followed on Monday, April 21, 2008. (II AA 276-278; California Rules of Court, rule 8.108 [Notice of appeal must be filed 30 days after the superior court mails, or party serves, an order denying the motion or a notice of entry of that order]; 30th day fell on Saturday, April 19.)

LEGAL ARGUMENT

I. THE CITY IS ENTITLED TO A NEW TRIAL BECAUSE OF SEVERAL PREJUDICIAL INSTRUCTIONAL ERRORS.

The legal adequacy of jury instructions is a question of law for this court, subject to de novo review. (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 24.) Moreover, "all instructions are deemed excepted to." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 59; Code Civ. Proc., § 647.)

When an appeal challenges the propriety of jury instructions, the standard of review is the opposite of the traditional substantial evidence test – i.e., all facts must be interpreted in the light most favorable to the losing party. (E.g., *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 423, disapproved on other grounds by *Reeves v. Hanlon* (2004) 33 Cal.4th 1140; *Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1413.) When the jury is erroneously instructed, the reviewing court will not speculate as to the impact those instructions might have had on the jury; rather, the reviewing court will presume the jury followed and was adversely influenced by the erroneous instructions. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 670.)

"Instructional error in a civil case is prejudicial '"where it seems probable" that the error "prejudicially affected the verdict."'" (*Green v.*

State (2007) 42 Cal.4th 254, 266.) The test is whether "'it is *reasonably probable* that instructions allowing application of an erroneous theory *actually* misled the jury.' [Citation.] A 'reasonable probability' in this context 'does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' [Citation.]" (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682, emphasis in original; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

A. The Jury Was Improperly Instructed On How To Determine If Wyatt Was An Employee Or An Independent Contractor Of The City.

For the City, perhaps the most critical issue in this case was the question whether Wyatt was an independent contractor or a City employee. Whether a party is an employee or an independent contractor is a question of fact for the jury unless the facts are undisputed and only one inference can be drawn therefrom. (*Brose v. Union-Tribune Publishing Co.* (1986) 183 Cal.App.3d 1079, 1081.)[1]

In determining whether a person is an employee or an independent contractor, numerous factors may be considered. (*Isenberg v. California*

[1] To the extent any issues in Wyatt's opening brief affect the negligence verdict against him and, therefore, the vicarious liability of the City for that alleged negligence, the City hereby adopts the arguments in Wyatt's brief as if they were its own.

Emp. Stab. Com. (1947) 30 Cal.2d 34, 39.) In this regard, the jury was instructed as follows:

> In deciding whether Tommie Wyatt, Junior was the City of Los Angeles's employee, you must first decide whether the City of Los Angeles had the right to control how Tommie Wyatt, Junior performed the work, rather than just the right to specify the result.
>
> It does not matter whether City of Los Angeles exercised the right to control. *If you decide that the right to control existed, then Tommie Wyatt, Junior was the City of Los Angeles' employee.*
>
> If you decide that the City of Los Angeles did not have the right of control, then you must consider all the circumstances in deciding whether Wyatt was the City of Los Angeles's employee.
>
> The following factors, if true, may show that Wyatt was the employee of the City of Los Angeles:
>
> (a) the City of Los Angeles supplied the equipment, tools, and place of work;
> (b) Tommie Wyatt, Junior was paid by the hour rather than by the job;
> (c) The work being done by Tommie Wyatt, Junior was part of the regular business of the City of Los Angeles;
> (d) the City of Los Angeles had an unlimited right to end the relationship with Tommie Wyatt, Junior;
> (e) The work being done by Tommie Wyatt, Junior was the only occupation or business of Tommie Wyatt, Junior;
> (f) The kind of work performed by Tommie Wyatt, Junior is usually done under the direction of a supervisor rather than by a specialist working without supervision;
> (g) The kind of work performed by Tommie Wyatt, Junior does not require specialized or professional skill;
> (h) The services performed by Tommie Wyatt were to be performed over a long period of time; and
> (i) the City of Los Angeles and Tommie Wyatt, Junior acted as if they had an employer-employee relationship.

(32 RT 4830-4831, emphasis added; II AA 322-323.)

Two problems plague this instruction. First, it improperly directs the jury to find Wyatt was an employee based solely on evidence that the City had the right to control some part of Wyatt's work. Second, it improperly skews toward a specific result – i.e., that Wyatt was the City's employee. We will explain.

1. The jury was improperly instructed that it must find Wyatt was the City's employee if it found the City had any right to control how Wyatt did his work.

While the existence of control, or lack thereof, is considered an important factor in determining whether someone is an employee or an independent contractor, it is not the only factor. (*APSB Bancorp v. Thornton Grant* (1994) 26 Cal.App.4th 926, 932-933.) Unless the defendant "'has the authority to exercise *complete* control'" over the worker's job, it cannot be said, as a matter of law, that the worker must be an employee. (See *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 873-874, emphasis added.) Where the right to control is not complete, the fact finder must be allowed to weigh the extent of the control that could be exercised against additional factors to determine if the worker is more like an employee or more like an independent contractor. The jury in this case was deprived of that opportunity. Indeed, the jury was expressly instructed *not* to consider any other factors unless and until it had determined the City had *no* right to control Wyatt's work.

There was, admittedly, evidence from which the jury could have concluded that the City had a right to control at least some of Wyatt's work – largely in the form of testimony that the City instructed Wyatt where to pick up the asphalt he was hauling, where to drop it off and when to do so. (24 RT 2476-2477, 2479.) But even as an independent contractor Wyatt would have needed this information from the City to perform his contract. Nevertheless, the instructions essentially directed the jury to find that Wyatt was an employee if it found that the City had *any* control over his work, without considering any other factors. This was improper. (*Rutherford v. Standard Engineering Corp.* (1948) 88 Cal.App.2d 554, 563 [reversible error to instruct jury, contrary to law, that evidence of "gross negligence" would *conclusively* establish an "intent to deceive"].)

If the jury here had been properly instructed, there was substantial evidence from which the jury could have concluded that Wyatt was an independent contractor, including the following:

- The agreement Wyatt signed with the City says he is an independent contractor. (I AA 42-49.)
- City officials considered him an independent contractor. (21 RT 1623; 24 RT 2492-2495.)
- Unlike employees, Wyatt worked on an "as needed" basis. (23 RT 2141.)
- The City did not guarantee Wyatt work, and he had to call in each day after 3:00 p.m. to see if his services would be needed the next day. (23 RT 2144; 24 RT 2512-2513, 2517.)

- After delivering his load, Wyatt could return to the yard or call in, as he saw fit, to determine if there was additional work to be done. (28 RT 3656, 3691-3692.)
- He was paid by the load, rather than by the hour. (21 RT 1641; 24 RT 2479-2480.)
- When he was done with his work, Wyatt was free to do what he wanted, unlike an employee. (22 RT 1952; 23 RT 2160.)
- He received no employee benefits. (23 RT 2140; 28 RT 3662.)
- He was not paid for sick time or vacation. (23 RT 2144.)
- He received a form 1099 at the end of the year. (22 RT 1951; 28 RT 3662.)
- Wyatt had no supervisor at the City; he worked for himself and was his own supervisor. (22 RT 1947-48; 24 RT 2494.)
- The City did not control the manner of transport when Wyatt hauled asphalt for it. (24 RT 2477.)
- Wyatt did not have to work exclusively for the City, was free to take other jobs, and could refuse a job offered by the City without penalty, except for not being paid that day. (22 RT 1952; 23 RT 2176, 2180; 28 RT 3647-3648, 3666.)
- Wyatt had to maintain his own truck, cell phone, and other equipment necessary for the job. (23 RT 2143, 2149.)

- Wyatt was responsible for repairing his truck, including the repairs necessitated by the instant accident. (24 RT 2516-2517; 28 RT 3648.)
- Both the City and Wyatt retained the right to terminate the contract for any reason with 30-day notice, contrasted with the lengthy process required to terminate City employees. (23 RT 2148.)

Based on this evidence, the jury would have been amply justified in determining that Wyatt was an independent contractor, rather than a City employee. However, the instructions never gave the jury that option: Rather, if it found the City had the right to control any portion of Wyatt's work, no matter how small, the jury was instructed to find that Wyatt was the City's employee.

That there was contrary evidence is irrelevant for purposes of the appeal. The question is not whether there is substantial evidence to support the verdict, but whether there is evidence that would have allowed the jury to make a different finding with the proper instruction. Thus, as noted above, when an erroneous instruction is given, the court must look at the evidence that supports the appellant's position. (*GAB Business Services, Inc.*, *supra*, 83 Cal.App.4th at p. 423.)

Moreover, and as explained in greater detail in section I.D. below, when the trial court's instruction effectively takes a factual issue away from the jury, the appellant is robbed of his right to a trial by jury and the error constitutes a miscarriage of justice, requiring reversal of the judgment

without a showing of actual prejudice. (*Collins Development Co. v. D. J. Plastering, Inc.* (2000) 81 Cal.App.4th 771, 778.)

2. The instruction on what constitutes an employee was improperly and unnecessarily skewed toward a particular result – i.e., that Wyatt was the City's employee.

Even if the jury concluded the City had no right to control Wyatt's work, and therefore reached the additional factors in determining the nature of Wyatt's relationship with the City, the instruction was unfairly skewed toward a particular result. Instead of permitting the jury to weigh the factors and to determine whether, under all the circumstances, Wyatt was an employee *or* an independent contractor, the instruction asked the jury only to determine whether Wyatt was an employee, with nothing to guide them except factors that, if true, are purportedly indicia of an employment relationship.

When a jury is asked to determine if someone is an employee, and is told that "[t]he following factors, if true, may show that [employment]" (32 RT 4830-4831), it is almost guaranteed that it will find employment. Why? Because there was no instruction identifying factors that may show Wyatt was an independent contractor. The necessary implication of the instruction given is that if the jury finds one or more of the factors listed are "true," it is to conclude Wyatt was an employee. With nine separate factors

listed, it would be surprising if, under the circumstances, the jury had determined Wyatt was *not* an employee.

Adding insult to injury, the instruction implies that the "unlimited right to end the relationship" suggests an employment relationship. (32 RT 4831, factor labeled (d); see p. 7, *supra*.) However, that was not the case here. First, it was undisputed that the City's right to end its relationship with Wyatt was not "unlimited" – rather, Wyatt was entitled to 30 days' prior notice. (23 RT 2148.) Second, to the extent the City did not need a reason to end its relationship with Wyatt, the evidence showed that it would be much more difficult to end a relationship with a City employee and, therefore, the City's right to terminate Wyatt's contract was indicative of an independent contractor relationship. (21 RT 1642; 23 RT 2147-2149; 24 RT 2504; see *Varisco v. Gateway Science and Engineering, Inc.* (2008) 166 Cal.App.4th 1099, 1107 ["An independent contractor agreement can properly include an at-will clause giving the parties the right to terminate the agreement. Such a clause does not, in and of itself, change the independent contractor relationship into an employee-employer relationship"].)

However, this was not fair to the City. The City was entitled to have the jury weigh the factors supporting employment against the factors that would support an independent contract. The instructions given to the jury utterly failed to allow for this weighing.

There is no way to tell from the verdict whether the jury determined Wyatt was an employee because it determined the City had the right to

control any part of Wyatt's work or based on a consideration of the listed factors which, as just explained, was geared toward a particular result. But either way, the instructions made clear that the only conclusion the jury could reasonably reach, whichever road it took, was that Wyatt was an employee of the City. Thus, the instruction effectively took the issue away from the jury.

B. The Trial Court Erred In Instructing The Jury That The City Was The Motor Carrier For Wyatt's Truck As A Matter Of Law.

Another issue hotly contested at trial was whether the City or Wyatt was the "motor carrier" for purposes of the accident. Since both Wyatt and the City were technically "motor carriers," the real question was which of them was the motor carrier for Wyatt's truck on the day in question.[2] Despite conflicting evidence on this issue, the trial court took it away from the jury, finding that the City was the "motor carrier" as a matter of law and so instructed the jury. (32 RT 4807.) This was error.

An issue may be determined by the court as a matter of law only where the evidence is undisputed *and* it leads to only one reasonable conclusion. (*Gonzalez v. Kalu* (2006) 140 Cal.App.4th 21, 31.) However,

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[2] Wyatt's admission, outside the presence of the jury, that he did not have a current motor carrier permit at the time of the accident (23 RT 2105) is completely a different issue. If Wyatt was the person who was supposed to be responsible for the truck – i.e., if he was the motor carrier – he cannot pass that responsibility off to the City by the sheer expedient of failing to maintain his permit.

if the evidence is in dispute, or more than one reasonable inference may be drawn therefrom, it is error to take the issue away from the jury.

In reaching its conclusion, the court relied on Vehicle Code section 34501.12, which provides, in relevant part, as follows:

> (a) Notwithstanding Section 408, as used in this section and Sections 34505.5 and 34505.6, "motor carrier" means the registered owner of a vehicle described in subdivision (a), (b), (e), (f), or (g) of Section 34500, except in the following circumstances:
>
> > (1) The registered owner leases the vehicle to another person for a term of more than four months. If the lease is for more than four months, the lessee is the motor carrier.

Thus, section 34501.12 changes the identity of the motor carrier for a particular vehicle from the owner of the vehicle to the lessee of the vehicle *if* it is a certain size and leased for more than four months.

Finding "no dispute between the parties" that Wyatt's truck was of the proper size and that his year-long contract with the City was "for more than four months" (32 RT 4807), the court concluded that the City was the motor carrier under section 34051.12. But in doing so, the court also erroneously assumed that it was "undisputed" that the City *rented* the truck from Wyatt. In fact, there remained a dispute between the parties over whether the City actually rented the truck from Wyatt at all.

Several witnesses explained that the City did not rent Wyatt's truck, but merely leased Wyatt's services. (22 RT 1925 [". . . the truck is not actually rented. It's an offer of work where the contractor asks the City, do they have work available"]; 24 RT 2442-2443 [Wyatt's truck "wasn't rented"].) Marion Chapman, a City employee, testified that any mention of

"renting" trucks in the agreement meant that *Wyatt* could use his own truck or rent one to use for his work with the City, and not that the City was *renting* Wyatt's truck. (24 RT 2466-2467.)

Consistent with this testimony, and further supporting a conclusion that the City did not rent Wyatt's truck, the evidence showed:

- The City did not have permission to take the truck from Wyatt's yard for its own use and that only Wyatt was permitted to drive it. (23 RT 2143; 28 RT 3669.)
- The City could refuse to give him work, but if Wyatt was not available, the City did not find another driver to drive his truck. (23 RT 2139, 2152.)
- Wyatt was free to use his own truck however he liked when not doing jobs for the City. (28 RT 3647-3648, 3666.)
- The truck was housed by Wyatt, and not by the City. (23 RT 2152.)
- Wyatt was responsible for inspection, maintenance and repair of the truck, as well as maintenance of inspection records for the truck. (23 RT 2143, 2160; 28 RT 3648.)
- Wyatt was paid by the weight of the load he carried, and not by the amount of time he used the truck to haul for the City. (21 RT 1641; 24 RT 2479-2480.)

The fact that there was contrary evidence, or that at least one witness testified both that the truck was rented and that it was not, does not change the analysis. Neither the trial court nor this court may make rulings based

on its own determination of what the facts are. Credibility is to be determined by the jury; the jury may believe some of what one witness says, while not believing other things that witness says; and the evidence of a single witness is enough to support a finding of fact. Thus, if there is disputed evidence on a material issue, the parties are entitled to have a jury determine the facts.

From the evidence cited above, the jury reasonably could have concluded that the City did not rent Wyatt's truck and, therefore, Wyatt remained the "motor carrier" for the truck. However, the jury was not given a chance to evaluate this evidence because the court took the issue away from it.

Furthermore, this was not a small or insignificant error. The determination of who was the motor carrier was the key to most of plaintiff's claims against the City for its own conduct (as opposed to claims for its liability for Wyatt's conduct). The jury was exhaustively instructed on the duties of a motor carrier; for example:

- The motor carrier must inspect the truck every 90 days. (32 RT 4814, 4819.)
- The motor carrier shall retain records of inspection for two years. (32 RT 4815.)
- The motor carrier must schedule inspections and may not operate a vehicle without first submitting inspection to the DMV. (32 RT 4818.)

- The motor carrier must repair anything on the truck likely to affect its safe operation. (32 RT 4823.)

When a single erroneous finding necessarily has an impact on other crucial issues in the case, the instruction that caused the original erroneous finding is prejudicial error. (See *Rutherford v. Standard Engineering Corp.*, *supra*, 88 Cal.App.2d at pp. 567-568 [instructional error was prejudicial where jury's factual finding based on an erroneous instruction that certain evidence was "conclusive" "permeates the other implied findings"].) As plaintiff's counsel aptly noted in closing argument to the jury, the trial court's finding that the City was the motor carrier, as a matter of law, was "tantamount to the City admitting that they didn't do what they needed to do. There is an admission of liability." (31 RT 4507-4508.) Except there was no "admission" by the City; rather, the court simply decided the issue for itself and took the issue away from the jury.

When an issue has been removed from consideration by the fact finder, and the evidence on the subject is in dispute, this court is not free to speculate on what the fact finder may have done if the issue had been properly presented. The parties are entitled to a decision by a jury, as explained in greater detail in section I.D.

C. The Trial Court Erred In Instructing The Jury That The City Could Be Held Vicariously Liable For Wyatt's Conduct As An Independent Contractor "To The Same Extent That A Private Person Would Be Liable" For Such Conduct.

In the midst of instructing the jury on causation, the court gave the jury the following instruction:

> The City of Los Angeles is liable for injury, the substantial cause of which was a negligent act or omission of Tommie Wyatt, Junior, even if he was an independent contractor rather than an employee, *to the same extent that a private person would be liable* for the acts or omissions of an independent contractor.

(32 RT 4833, emphasis added.)

While the instruction is a correct statement of the law, it is both incomplete and misleading in this context. Indeed, the court gave it little context at all. The instruction was stuck in the middle of causation instructions and, in fact, was followed immediately followed by an instruction defining causation. (32 RT 4833 ["The law defines cause in its own peculiar way"].)

The instruction, standing alone, told the jury only that the City must be treated the same as any private person. What it did not do was tell the jury *to what extent a private person would be liable* in these circumstances. In fact, "[t]he general rule is that one is *not* liable for the acts of an independent contractor." (*O'Gan v. King City Joint Union High School Dist.* (1970) 3 Cal.App.3d 641, 646, emphasis added.) Thus, as a general rule, a public entity is *not* liable for the acts of an independent contractor.

Yet the instruction without this information clearly has the opposite connotation: Indeed, it does not even hint at any possible limitation – for example, that the City could be liable *only* to the extent that a private person would be.

That the jury was properly instructed as to the exceptions to the general rule – e.g., that a person could be liable for the negligence of an independent contractor under the peculiar risk doctrine – does not change the fact that at no point was the jury told that these were the *only* circumstances under which the City could be held liable for Wyatt's work as an independent contractor.

The original instruction offered by plaintiff apparently included language regarding the peculiar risk doctrine. Counsel for the City objected to the instruction on the ground that it was cumulative – there was already an instruction on the special risk of harm. (30 RT 4267; cf. 32 RT 4832.) The trial court partially granted the City's request by omitting some, but not all, of the instruction – i.e., it omitted any reference to the peculiar risk doctrine, but left in the general language that, by itself, could only have been confusing to the jury.

Plaintiff contended that the instruction was necessary because it was the "only one" that mentioned an independent contractor. (30 RT 4262.) Whether or not any other instruction used the term "independent contractor" is decidedly beside the point. The instruction at issue, in fact, only mentions the term, but does not define it or explain to what extent a private person may be liable for the acts of an independent contractor. Without this

information, the instruction was completely useless to the jury, except to the extent that it was affirmatively confusing or misleading.[3]

D. These Instructional Errors Were Clearly Prejudicial.

Instructional error requires reversal on appeal when it appears there has been a miscarriage of justice. (*Bolen v. Woo* (1979) 96 Cal.App.3d 944, 951.) Such a miscarriage of justice exists when the error takes issues of fact from the jury, thereby denying the appellant his constitutional right to a trial by jury. (*Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 125.) In such cases, the judgment must be reversed. (*Ibid.*)

The right to a trial by jury is guaranteed by the California Constitution. (Cal. Const., Art. I, § 16; *Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 694.) It is guaranteed to civil, as well as criminal, litigants. (*Ibid.*) When the trial court improperly takes an issue of fact away from the jury, it "is reversible error per se, without the need to demonstrate actual prejudice." (*Collins Development Co. v. D. J. Plastering, Inc.*, *supra*, 81 Cal.App.4th at p. 778; *Arciero Ranches v. Meza*, *supra*, 17 Cal.App.4th at p. 125; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 527.)

Here, the errors in instructing the jury effectively took at least two critical issues away from the jury, robbing the City of its right to a trial by jury on those issues. The jury was improperly told that the City was the

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[3] In fact, the jury was specifically instructed as to the circumstances under which the City could be held liable for Wyatt's conduct "even if Wyatt was not an employee." (32 RT 4832.)

motor carrier, and therefore responsible for maintaining Wyatt's truck, and, essentially, that they should find Wyatt was an employee of the City. The City was entitled to have these critical, disputed issues decided by the jury and not by the court. The jury is permitted to make credibility determinations, and to decide an issue based on the testimony of a single witness, even if the weight of the evidence appears to be to the contrary.

Any attempt by the court to guess what the jury would have decided if given the chance is speculative, improper and unconstitutional. The parties are entitled to have the jury make a determination of the evidence before it is reviewed by the appellate courts. For these reasons, the judgment in favor of plaintiff must be reversed and a new trial ordered.

II. THE VERDICT MAY NOT BE UPHELD ON THE GROUND OF AGENCY, SINCE THERE WAS NO EVIDENCE THAT WYATT WAS IN ANY WAY THE CITY'S AGENT.

It is, of course, well settled that an appellate court should affirm the judgment of the trial court upon any theory that supports the judgment. (*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 568.) Here, the jury was instructed that the City may be liable for Wyatt's negligence on the theory that he was an employee *or agent* of the City. (32 RT 4829.) They were further instructed that Wyatt was the City's agent "[i]f plaintiff proves that City of Los Angeles gave Wyatt authority to act on its behalf." (32 RT 4835.)

Although the parties used the terms interchangeably, there is, in fact, a difference between the two relationships. "'An agent is one who represents another, called the principal, in dealings with third persons.' (Civ. Code, § 2295.) Witkin explains the difference between an employee (e.g., a coworker) and an agent as follows: 'It is said that a[n] employee works for his employer, while an agent also acts for and in the place of the principal for the purpose of bringing him into legal relations with third persons.' [Citation.]" (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1047.) Thus, a casting director acts as an agent for a network "in terms of finding, grooming, and recruiting actors for [network's] shows." (*Ibid.*)

In this case, there was no contention that Wyatt – whether an employee or an independent contractor – had the power to bind the City to any legal obligation, or that Bowman at any time believed Wyatt to be the agent of the City in this regard. (See 30 RT 4232, 4234.) Indeed, plaintiff made no argument that Wyatt had the authority to act on the City's behalf, but used the terms "employee" and "agent" interchangeably.

Since there was no evidence to support even an implicit finding that Wyatt was an agent of the City in the strictest sense, the judgment may not be upheld on the ground that Wyatt was the City's agent. Indeed, the instruction on agency was irrelevant and improperly given in the first place.

III. THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE CONDITION OF THE BRAKES OR THE TRUCK GENERALLY WAS A PROXIMATE CAUSE OF THE INJURY.

In addition to finding the City liable for Wyatt's negligence, the jury found the City liable to plaintiff for failing to inspect or maintain the brakes of the truck and for a dangerous condition of public property – namely, Wyatt's truck – based on evidence that after the accident, numerous mechanical problems were found in the truck. (I AA 68.) To succeed on these claims, plaintiff was required to prove, by a preponderance of the evidence, that the brakes or some dangerous condition of the truck was a proximate, or legal, cause of the accident and plaintiff's injuries. Put another way, the judgment on these claims cannot be affirmed on appeal if there is no substantial evidence to support a finding on causation.

Plaintiff advanced two theories of causation at trial. The first theory was that if the City had inspected Wyatt's truck and the brakes before the accident, it would have taken the truck off the road and the accident would not have happened. The second theory, mentioned almost in passing, was that the collision may have occurred because the brakes on the truck failed. Neither theory works.

A. To Prove Proximate Causation, It Is Not Enough Merely To Show That Under Different Circumstances, The Injury Would Not Have Occurred At All.

Plaintiff contended that if the City had inspected the truck regularly as required by the Vehicle Code, then it would have found problems with the truck's brakes and other features on the day of the accident and would have taken the truck off the road. The argument is that if the truck had not been on the road that day, the accident would not have happened.

While this is technically true, it is equally true that the accident would not have happened if Wyatt had left the construction site 10 minutes earlier or 10 minutes later than he did, or if plaintiff had taken a different route. This is commonly referred to as "cause in fact" or "but for" causation. But it is not necessarily a proximate, or legal, cause of the injury.

"'[E]ven though one has been guilty of negligence, he may still not be liable ... if such negligence is remote in the chain of causation and did not contribute proximately to the injury.'" (*Johnson v. Union Furniture Co.* (1939) 31 Cal.App.2d 234, 237.)

"In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. 'The fatal trespass done by Eve was cause of all our woe.' But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'" (Prosser, Law of Torts (4th ed.

1971) § 41, p. 236.) In determining proximate causation, "care must be taken to avoid confusing two elements which are separate and distinct, namely, that which causes the injury, and that without which the injury would not have happened. For the former the defendant may be liable, but for the latter he may not." (*Johnson v. Union Furniture Co.*, *supra*, 31 Cal.App.2d at p. 237.)

Plaintiff was required to establish that the City's alleged wrongful act was a direct and substantial factor in causing the harm. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 772.) When a "plaintiff seeks to prove an essential element of her case by circumstantial evidence, she cannot recover merely by showing that the inferences she draws from those circumstances are *consistent* with her theory. Instead, she must show that the inferences favorable to her are *more reasonable or probable* than those against her." (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, emphasis in original.) Failing in this, judgment must be for the defendant. (See, e.g., *Beaupre v. Nave* (1970) 13 Cal.App.3d 402, 405 [restaurant's sanitation violations were not the cause of plaintiff's hepatitis infections]; *Provin v. Continental Oil Co.* (1942) 49 Cal.App.2d 417, 424 [when plaintiffs were injured or killed after their car ran into a tanker making a U-turn across a four-lane highway, allegation that the improper location of the loading rack from which the tanker was leaving was a proximate cause of the injury did not state a claim against the defendant-owner of the loading rack; "The right-hand U turn of the tanker . . . was

entirely separate and distinct from any use or maintenance of the loading rack"].)

It is purely speculation and conjecture to say that Wyatt's truck would not have been on the road if the City had inspected the brakes and the rest of the truck on the morning of the accident. First, plaintiff's argument assumes that an inspection on that morning would have shown the brakes did not work – which was only true, in plaintiff's view of the evidence, because the City had neglected inspecting the brakes for years. Thus, plaintiff's argument that the truck would not have been on the road on the day of the accident depends on the City neglecting this duty for years and then picking it up for the first time on the morning of the accident. Yet there were no facts to support this assumption.

If, instead, the City had been inspecting the brakes all along, as plaintiff contends it should have, but failed to do so on the morning of the accident only, then it would be plaintiff's burden to show that, notwithstanding the prior inspections, an inspection on that morning would have revealed a problem with the brakes. This, of course, would be pure speculation. Wyatt himself testified that he did inspect the brakes that day and they were fine, and also that they were working all day. (28 RT 3669, 3678-3679.) Thus, it is entirely likely that the City, inspecting the brakes that day, would have found them working and Wyatt would, in fact, have been driving for the City on the day in question. (Cf. *Armenta v. Churchill* (1954) 42 Cal.2d 448, 458-459 [in action for injuries sustained while

13,900-pound truck was being slowly backed up, that driver did not have license to operate the truck was immaterial].)

Furthermore, if the City had been inspecting and maintaining the brakes and the truck according to the Vehicle Code as plaintiff alleges, then it is just as likely that any problems would have been repaired earlier and the truck would have passed inspection on the day in question, or that any problem might have been fixed quickly so that Wyatt could continue with his work. Thus, it is not "more likely than not" that the City's failure to inspect the brakes was a substantial factor in causing the accident or injury, and this theory cannot support the verdict in plaintiff's favor.

B. There Was No Substantial Evidence That The Brakes On The Truck Failed.

Plaintiff also argued that the jury could infer that the brakes failed, based on evidence that the truck failed to stop at the limit line or afterwards. Plaintiff introduced evidence that an inspection of the truck after the accident revealed certain deficiencies that the experts testified had not been caused by the crash. (29 RT 4019.) When asked if he found any mechanical difficulties with the truck that contributed to the accident, a witness who had examined the truck after the accident simply said he "found some" (29 RT 4017), but without identifying anything specifically that contributed to the collision. Indeed, he affirmatively testified that although the truck was leaking air, that had "no effect" on the brakes

(29 RT 3989) and that the brakes were working – “three good brakes within compliance and one very close to compliance” (29 RT 3995).

Alan Coulter testified for plaintiff that more than 20 percent of the truck’s brake assemblies were ineffective or did not function as designed, and that this “affects” the vehicle’s ability to stop – but he did not explain what this effect would be. (23 RT 2234.) Neither did he testify that the collision was caused by the brakes failing or malfunctioning.

Plaintiff argued that testimony of witnesses to the accident that Wyatt rolled through the stop sign and into the intersection at a slow speed was sufficient to support an inference that the brakes had failed. (31 RT 4516-4517.) But, in fact, there was no evidence that the brakes had failed in any way. Indeed, none of the witnesses testified that it looked like Wyatt was trying to stop, which is what plaintiff’s counsel told the jury. (*Ibid*.) Even Wyatt did not testify that he tried to stop and failed; rather, he testified that the brakes worked fine and that he did stop the truck, three times, in fact, before the accident and again after he hit the motorcycle. (28 RT 3626-3627.) Even if the jury did not believe his testimony, at best that would mean he did not stop; but it’s a large leap from there to “the brakes failed.” Nor is it proof that the brakes failed that one witness thought Wyatt was going to stop at the limit line: It could just mean that he expected anyone to stop at a stop sign.

Although a trier of fact is free to accept or reject a witness’s testimony, such disbelief cannot supply the existence of a fact nor may it supply substantial evidence in support of a verdict. (*Casetta v. U.S. Rubber*

Co. (1968) 260 Cal.App.2d 792, 808 ["even if it were disbelieved by the jury, such disbelief cannot supply the lack of affirmative proof"]; cf. *In re Alcala* (1990) 222 Cal.App.3d 345, 373 [one witness's opinion that he didn't "believe the clothing issue really has any impact on how the people manage to escape" "does not constitute substantial evidence that clothing had no effect [on escapes]"].) Moreover, as explained above, plaintiff "cannot recover merely by showing that the inferences she draws from those circumstances are *consistent* with her theory. Instead, she must show that the inferences favorable to her are *more reasonable or probable* than those against her." (*Leslie G. v. Perry & Associates*, *supra*, 43 Cal.App.4th at p. 483, emphases in original.) Here, although plaintiff argued the jury could draw an inference that the brakes failed from evidence that the truck failed to stop at the stop sign, that inference is not more likely than an inference that Wyatt merely failed to step on the brakes.

"Substantial" evidence is not the same as "any" evidence. It must be more than a mere scintilla, more than speculation or conjecture. (*In re Alcala*, *supra*, 222 Cal.App.3d at p. 373.) Evidence that Wyatt went slowly through the intersection, alone, is not substantial proof that the brakes failed. For this reason, too, the judgment against the City should be reversed.

IV. THE COURT ERRED IN ALLOWING THE JURY TO FIND THAT THE DUMP TRUCK INVOLVED A SPECIAL RISK OF HARM.

Bowman alleged that Wyatt's work for the City involved a special or peculiar risk of harm, and that the City was liable for Bowman's injuries because of its failure to take safety measures to reduce the special risk. The trial court submitted to the jury a general verdict form requesting a special finding on this issue, and instructed the jury with the standard peculiar risk instruction, CACI 3708:

> Plaintiff Barry Bowman claims that even if Wyatt was not an employee, City of Los Angeles is responsible for conduct because the work involved a special risk of harm. [¶] A special risk of harm is a recognizable danger that arises out of the nature of the work or the place it is done and requires specific safety measures appropriate to the danger. A special risk of harm may also arise out of a planned but unsafe method of doing the work. A special risk of harm does not include a risk that is unusual, abnormal, or not related to the normal or expected risks associated with the work. [¶] To establish this claim, Plaintiff must prove each of the following: [¶] 1. That the work was likely to involve a special risk of harm to others; [¶] 2. That City of Los Angeles knew or should have known that the work was likely to involve this risk; [¶] 3. That Wyatt failed to use reasonable care to take specific safety measures appropriate to the danger to avoid this risk; and [¶] 4. That Wyatt's failure was a cause of harm to Bowman.

(I AA 68; 32 RT 4832.)

The jury returned a verdict in favor of Bowman on several theories of liability, and specifically found that the work of Wyatt and the dump truck involved a special risk of harm. (I AA 68.) The court erred in allowing the jury to make this special finding because, as a matter of law, the dump truck did not involve a special risk.

A. As A Matter Of Law, Wyatt's Unladen Truck Did Not Involve A Special Risk Of Harm.

The general rule is that someone who employs an independent contractor is not liable for the contractor's negligence. (*A. Teichert & Son, Inc. v. Superior Court* (1986) 179 Cal.App.3d 657, 661 (*Teichert*).) An exception to this rule arises where the contractor's work involves a peculiar risk. (*Ibid*.) "'A peculiar risk is a risk which is peculiar to the work to be done and arises out of its character or the place where it is to be done, and against which a reasonable person would recognize the necessity of taking special precautions.' [Citations.] It is something other than the ordinary and customary dangers which may arise in the course of the work or of normal human activity." (*Id*. at pp. 661-662.)

In this case, Wyatt's dump truck could have involved a peculiar risk only if it posed a risk not presented by other motor vehicles on the road and if special precautions could have reduced that risk. For instance, if the truck had been laden with asphalt, there would have been a risk that the asphalt would fall off the truck. In that case, Wyatt would have needed to take precautions to secure his load, and the failure to take such precautions could have properly rendered the City liable, as illustrated in the Restatement of Torts, section 416, comment d:

> [I]f a contractor is employed to transport the employer's goods by truck over the public highway, the employer is not liable for the contractor's failure to inspect the brakes on his truck, or for his driving in excess of the speed limit, because the risk is in no way a peculiar one, and only an ordinary precaution is called for. But if the contractor is employed to transport giant logs weighing several tons over the highway,

> the employer will be subject to liability for the contractor's failure to take precautions or anchor them on his trucks.

(Rest., Torts, § 416, com. d, cited in *Teichert*, *supra*, 179 Cal.App.3d at p. 662.)

Teichert illustrates the scope of the peculiar risk doctrine and is directly on point. In *Teichert*, *supra*, 179 Cal.App.3d at p. 662, a dump truck driven by an independent contractor was turning left and hit a cyclist, and the plaintiff claimed that the trucking company—the driver's employer—was liable for the cyclist's injuries because the dump truck was a peculiar risk of harm. The trucking company moved for summary judgment, and the trial court denied it. The Court of Appeal reversed, finding that the dump truck did not constitute a peculiar risk as a matter of law. It reasoned that there was "no direct relationship between the particular work performed by [the driver], i.e., hauling a truck load of asphalt, and the accident. The incident could have occurred just as easily if [the driver] were driving a standard passenger vehicle or an 'eighteen-wheeler.'" (*Teichert*, *supra*, 179 Cal.App.3d at p. 662.) Therefore, it held that the peculiar risk exception did not apply because there was no risk inherent in the truck driver's work apart from the ordinary risk that he would not use due care while driving.

Wyatt's dump truck did not involve a peculiar risk of harm for the same reason that the truck in *Teichert* did not: There was no direct relationship between any risk inherent in Wyatt's work, i.e., hauling asphalt, and the accident. Wyatt's truck was unladen, and so he did not need to take any special precautions to secure the load; rather, he only

needed to exercise the same care that any motor vehicle operator would be expected to exercise. Thus, as a matter of law, the unladen dump truck cannot have involved a peculiar risk of harm.

Despite the inapplicability of the peculiar risk doctrine to these facts, the trial court concluded that a reasonable jury could find that a truck weighing several tons on a highway could create a peculiar risk of harm. (15 RT X-14-16.) On this basis, it instructed the jury on the peculiar risk doctrine, relying on *Anderson v. L.C. Smith Construction Co.* (1969) 276 Cal.App.2d 436 (*Anderson*), and *Castro v. State of California* (1981) 114 Cal.App.3d 503 (*Castro*). Neither case supports the use of the peculiar risk instruction on the undisputed facts of this case.

In *Anderson*, an engineer working on a freeway construction project was killed when a loaded dump truck backed up and ran over him. The undisputed evidence showed that the truck had no warning device, in violation of state law. (*Anderson*, *supra*, 276 Cal.App.2d at p. 440.) The decedent's survivors filed suit and requested a jury instruction on peculiar risk at trial. The trial court refused it. (*Id*. at p. 445.) On appeal, the court concluded that the failure to give the instruction was prejudicial error because the evidence was sufficient to support findings that the work involved a peculiar risk unless special precautions were taken and the driver's company had failed "to exercise reasonable care to take such precautions." (*Id*. at pp. 445-446.)

Similarly, in *Castro*, *supra*, 114 Cal.App.3d 503, a dump truck driver was injured when a fellow employee backed up and ran over him. (*Id*. at

p. 507.) Both men were employed by an independent contractor of the State. (*Ibid*.) The evidence showed that the dump truck drivers could not see directly behind them at distances of 85 feet or less, the truck was equipped with inaudible backup bells, and no spotter assisted the driver with backing up, although an inspector could have required a spotter if he deemed it necessary and an expert testified that a spotter should have been used in that instance. (*Id*. at pp. 512-513.)

The jury found that the State should have recognized that the work involved a peculiar risk of harm absent special precautions. (*Id*. at p. 509.) The State filed a JNOV motion on the ground that the evidence was insufficient as a matter of law to support the peculiar risk finding, and the trial court granted it. (*Ibid*.) But the Court of Appeal reversed because it found substantial evidence that the State should have recognized that the risk of someone being struck by dump trucks backing up for more than a half block was inherent in an approved plan unless special precautions were taken. (*Id*. at p. 516.)

Anderson and *Castro* are completely inapposite. In both cases, the peculiar risk involved limited visibility: A truck was backing up and ran over someone behind it. The drivers could not see behind them and their limited visibility stemmed from the vehicle's broad dimensions—a problem that could have been offset with warning devices or a spotter. (*Anderson*, *supra*, at p. 443; *Castro*, *supra*, at p. 513.) Although both cases involved dump trucks, neither case found the peculiar risk to lie in the weight of the vehicle.

The dump trucks in *Anderson* and *Castro* were found to be peculiar risks because the drivers failed to take precautions to counter their limited visibility. In this case, in contrast, the undisputed evidence was that Wyatt was going forward, so the visibility problems that accompany reversing a large truck were not present. Furthermore, there were no special safety measures that could have been taken to prevent the collision between Wyatt and Bowman. The risks involved were ordinary risks—"The incident could have occurred just as easily if [the driver] were driving a standard passenger vehicle or an 'eighteen-wheeler.'" (E.g., *Teichert*, *supra*, 179 Cal.App.3d at p. 662.) In short, the factors that warranted application of the peculiar risk doctrine in *Anderson* and *Castro* simply were not present in this case.[4]

B. No Peculiar Risk Caused The Accident Or Injury In This Case.

Even if it could be concluded that the court properly found that the dump truck involved a peculiar risk, either because of its weight or its capacity to haul asphalt, there was no evidence that either of these features caused the collision between Wyatt and Bowman. There was no evidence that the truck's weight, hauling mechanisms, or any other feature peculiar to the dump truck interfered with its ability to stop, or otherwise contributed,

[4] Plaintiff also argued that *Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d 594, 604, supported finding that Wyatt's truck posed a peculiar risk in this case. (2 RT C-54-55.) *Taylor* said nothing about whether a vehicle's weight brought it within the realm of peculiar risk. It merely stated that Oakland had a nondelegable duty based on the truck's weight. Nondelegable duty is a completely separate issue, unrelated to the peculiar risk doctrine.

caused or was a substantial factor in the accident. There was evidence that Wyatt failed to stop at the intersection, and undisputed evidence that Wyatt made a left-hand turn and hit Bowman's motorcycle. (20 RT 1260-1265; 21 RT 1506-1514; 28 RT 3625-3627; 29 RT 3909-3917.) In short, the collision would have happened in the same way regardless of the type of vehicle Wyatt was driving.

Bowman's reliance on the peculiar risk theory is misplaced, as evidenced by his failure to demonstrate how Wyatt's truck was a peculiar risk, or how such a risk proximately caused the accident. In closing arguments, Bowman asked the jury to impose liability on the basis of the following causal connection: The weight of the truck required the operator to have a motor carrier license and subjected the vehicle to a series of inspections; these requirements were special precautions that the City should have taken; and if the City had observed them, Wyatt's truck would not have been on the road. (31 RT 4526-4527.)

As a threshold matter, the possession or nonpossession of an operating license is never evidence of proximate cause. (See, e.g., *Strandt v. Cannon* (1938) 29 Cal.App.2d 509, 515, 518 ["whether the operator had a license to operate an automobile under the laws of this state is immaterial unless there is some causal relationship between the injuries and the failure to have a license or the violation of the statute in failing to have one"]; *Hunton v. California Portland Cement Co.* (1942) 50 Cal.App.2d 684, 691 ["it may be that more skill is required in the operation of a heavy truck than in the management of a pleasure vehicle, but it does not follow that the

question of possession of a chauffeur's license is material in a particular case irrespective of causal connection between the violation of a statute in failing to have such license and the damage complained of ”].)

Likewise, the failure to obtain a proper license or inspection also is not a proper basis for finding a peculiar risk of harm. The peculiar risk doctrine imposes liability where an employer should recognize that the work he employed someone to do will likely create a peculiar risk *unless* special precautions are taken. (*Teichert*, *supra*, 179 Cal.App.3d at pp. 661-662.) Thus, the precautionary measures that the doctrine contemplates must be aimed at reducing an elevated risk. Assuming for the sake of argument that Wyatt’s truck actually involved a peculiar risk based on its weight or hauling capacity, neither a special license nor inspections would have reduced the risk of physical harm posed by either of those characteristics. Without any evidence that the peculiar risk caused the accident, the jury’s special finding on peculiar risk cannot stand.

CONCLUSION

The City is entitled to a reversal with directions on plaintiff’s claims of failed brakes, dangerous condition and peculiar risk. At the very least, the City is entitled to a new trial on these claims based on the court’s failure to allow the jury to determine who was the motor carrier and, therefore, who had the duty to maintain Wyatt’s truck.

In either case, the City is entitled to a new trial on the negligence claim and, more specifically, the question of whether Wyatt was an employee or an independent contractor at the time of the accident.

Dated: April 29, 2009

JOHN P. DeGOMEZ

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By: ______________________________
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Attorneys for Defendant and Appellant
CITY OF LOS ANGELES

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, that the **APPELLANT'S OPENING BRIEF** is produced using 13-point Roman type including footnotes and contains approximately **9,726** words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 29, 2009

____
Sheila A. Wirkus

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **April 29, 2009**, I served the foregoing document described as **APPELLANT'S OPENING BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes as stated below.

[✔✔] BY MAIL: I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid as follows:

******** SEE ATTACHED SERVICE LIST ********

I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **April 29, 2009**, at Los Angeles, California.

[✔✔] STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

____

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Clerk to the
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Los Angeles County Superior Court
111 North Hill Street, Dept. 42
Los Angeles, California 90012
[LASC Case No. BC329390 (Consolidated with PC038773)]

Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, California 94102
[Four (4) Copies]